IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 8736 of 2002

For Approval and Signature:

Hon'ble MR.JUSTICE M.S.SHAH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

ANITA BHANDARI

Versus

UNION OF INDIA

Appearance:

1. Special Civil Application No. 8736 of 2002

MR PARITOSH CALLA for Petitioner No. 1-3

MS PJ DAVAWALA for Respondent No. 1

MR PRASHANT G DESAI for Respondent No. 2-4

CORAM : MR.JUSTICE M.S.SHAH

Date of decision: 28/10/2002

ORAL JUDGEMENT

Rule. Ms PJ Davawala, learned Additional Standing Counsel for the Union of India and Mr Prashant G Desai, learned counsel for respondent Nos. 2 to 4 waive

service of Rule.

2.1 Petitioner No. 1 is the widow and petitioner Nos. 2 and 3 are minor children (aged 9 and 2 years respectively) of late Shri Suresh M Bhandari. The deceased was a Chartered Accountant practising at Surat. The deceased had also filed the income-tax return for the year ended on 31.3.2000 (AY 2000-01) wherein his income from profession was shown as Rs.2,21,610/-.

2.2 On 4.4.2001, the deceased had gone to Dena Bank, Surat for a banking transaction but he was shot dead by Mr Nagjibhai Kanjibhai Parmar, an employee of Dena Bank working as a security guard, which was a rash and reckless act in course of his employment. The deceased died on the spot on account of the fire arm wound on the chest of the deceased.

2.3 It appears that on account of the tragic incident, the bank on humanitarian grounds was inclined to offer employment to petitioner No. 1-widow of the deceased by offering her a job at Jodhpur where the petitioners are now residing after the tragic incident. However, when the bank sought instructions of the Central Government, the Central Government declined to grant the permission.

2.4 The petitioners have, therefore, filed the present petition for a writ to direct the respondent-bank and the Union of India to pay the petitioners a sum of Rupees One crore alongwith interest at 12% per annum from the date of death of the husband of petitioner No. 1 till realization. The petitioners have also prayed for a direction to the respondents to appoint petitioner No. 1 on a suitable post in the respondent-bank at its Jodhpur Branch commensurate with her qualifications.

Pending final disposal of the petition, the petitioners have also prayed for interim compensation and also appointment on a suitable post with the respondent-bank with salary commensurate with the qualifications of petitioner No. 1.

3. At the hearing of this petition, Mr Paritosh Calla, learned counsel for the petitioners has invited the attention of the Court to the manner in which the alleged incident took place. He has read out the material on record including the FIR dated 4.4.2001 (page 17) as well as the statement dated 4.4.2001 of Mahendrabhai Harilal Kothawala, aged 50 years, who was a rickshaw driver and was an eye witness to the incident.

3.2 It is submitted that by an unlawful tortious act of the security guard who was acting in the course of his employment with the respondent-Bank, the petitioners have lost their sole bread winner and, therefore, the petitioners are entitled to get the writ of this Court for directing the respondents to appoint petitioner No. 1 as an employee of the respondent-bank at its Jodhpur branch where the petitioners are residing. It is further submitted that in a large number of matters now the Hon'ble Courts have been directing the authorities to pay compensation in case of death of the concerned person.

3.3 It is submitted that the deceased was practising Chartered Accountant who was aged 34 years and earning substantial income. As per his income-tax return for the year ended on 31.3.2000, his professional income was Rs.2,21,610/-. Hence, considering the well settled legal principles, the petitioners would be entitled to be awarded substantial amounts. The petitioners, have, therefore, prayed for a sum of Rs. 1 Crore as damages. In any view of the matter, the interim compensation is required to be awarded to the petitioners so that they do not have to suffer any misery till they get the final compensation amount.

3.4 On behalf of the petitioners, strong reliance is has been placed on the decision of this Court in State of Gujarat vs. Dharmistaben N Rana, 2001(3) GLR 2056 and on the decisions of the Apex Court in 1995(5) SCC 659, 2001 (8) SCC 151, AIR 2000 SC 988, AIR 1989 SC 1607 and 1983 (4) SCC 141 in support of the contention that while exercising writ jurisdiction under Article 226 of the Constitution, this Court has ample powers to issue writ wherever there is any injustice to grant relief to the party.

4. Mr Desai for the respondent-bank has submitted that -

4.1 The only remedy available to the petitioners is to file a civil suit for damages and the bank would be entitled to raise all available defences such as - even if the security guard was negligent, there was also contributory negligence on the part of the deceased and that in any view of the matter the bank would not be vicariously liable for the tort committed by the security guard.

4.2. Since the bank had not authorized or instructed the security guard to shoot at a customer or to use the

weapon recklessly, the security guard was not acting in the course of his employment when the incident in question took place. It is further submitted that the bank is not vicariously liable for any act of commission or omission on the part of the security guard beyond the scope of his authority. Reference is also made to various decisions including the decision of the Apex Court in Kasturi Lal vs. State of U.P., AIR 1965 SC 1039 and other decisions such as Hillen and Pettigrew vs. ICI (Alkali) Ltd., 1936 AC 65, Warren vs. Henlys Ltd., 1948 (2) All.ER 935 and Abrahams vs. Deakin, 1891 QB 516.

4.3 Although the bank was initially considering giving petitioner No. 1 appointment on compassionate ground, the Government has already rejected the said proposal on the ground that the service regulations permit appointment on compassionate ground only of heirs of the deceased employees and not of heirs of the customers. It is, therefore, submitted that if such claim for compassionate appointment were to be granted in all the tort cases, the claimants would be entitled to claim compassionate appointment and to claim compensation.

5. Ms Davawala, learned Additional Standing Counsel for the Central Government has submitted that the Central Government has rejected the bank's proposal for giving the widow of the deceased compassionate appointment on the ground that a job on compassionate basis can be offered only to the heirs of the deceased employees and that since the deceased was not an employee of the bank, but was a customer, the widow of the deceased cannot be offered employment on compassionate ground. The Government further is of the view that the employee of the bank who is alleged to have caused the death of the deceased has not so far been found guilty of the crime alleged against him by the competent Court. According to the Government, the bank is not liable for the unlawful action of its employees.

6. In view of the order that this Court proposes to pass, it is not necessary to go into greater details of the evidence on record. Suffice it to state that for the purpose of entering the bank premises the deceased was parking his scooter in front of the bank. At that point of time, it appears that the cash box of the bank was being brought into the bank premises and the security guard of the bank objected to the deceased parking the scooter in front of the bank. However, though the deceased had not made any attempt to assault the security guard nor had the deceased made any attempt even to touch

the cash box or the vehicle carrying the cash box, the security guard shot at the deceased. The act of the security guard would have to be prima facie held to be rash and reckless.

7. The learned counsel for the bank, however, submitted that the security guard was not acting in the course of his employment when he shot at the deceased as the bank had not authorized or instructed the security guard to shoot at the customer. The learned counsel has placed reliance on the following statement of law as contained in "Salmond on Torts" :-

> "A master is not responsible for a wrongful act done by his servant unless it is done in the course of his employment. It is deemed to be so done if it is either (a) a wrongful act authorized by the master, or (b) a wrongful and unauthorized mode of doing some act authorized by the master. ... ... if the unauthorized and wrongful act ... .. is not so connected with the authorized act as to be a mode of doing it, but is an independent act, the master is not responsible : for in such a case the servant is not acting in the course of his employment, but has gone outside of it."

Strong reliance is also placed on the principle laid down in Warren vs. Henlys Ltd. (Supra) that the master is not responsible for the acts of the employee done out of caprice.

8. While there can be no denying the statement of law contained in Salmond on Torts, it is not possible to describe the act in question as an independent act. Since the unlawful act of the security guard was so connected with the authorized act of ensuring the cash box being safely brought into the bank, the unlawful act was a part of the mode of performing the authorized act. The fact that if the employer were present on the spot it would not have authorized the security guard to fire at the deceased does not mean that the act was not done in the course of employment. Once the bank employed Nagjibhai Kanjibhai Parmar as a security guard and entrusted him with a gun, the bank necessarily left it to him to determine, according to the circumstances that arise, when the gun is to be used and trusted him for the manner in which it is done and consequently the bank is answerable for the wrong of the security guard not only in the wrong manner of using the gun but also in using the gun under the circumstance in which it ought not to

have been done. The security guard might have been overzealous in his perception of the duties that he was to discharge and, therefore, arrival of the cash box near the bank premises might have been considered by him to be of such kind of act connected with his duties for the safe entry of the cash box in the bank premises that even wrong parking of the scooter by the deceased in front of the bank premises was a circumstance which incited him to take cudgels with the deceased and even shoot at him. At the highest it was a circumstance under which the security guard ought not to have shot at the customer, but it cannot be said that it was done from any caprice of the security guard. The act in question was, therefore, in the course of employment of the security guard with the respondent-bank.

9. In Bayley vs. Manchester, Sheffield and Lincolnshire Ry. Co. (1873) LR 8 C.P. 148, Willes, J. laid down the following principle :-

> "A person who puts another in his place to do a class of acts in his absence, necessarily leaves him to determine, according to the circumstances that arise, when an act of that class is to be done, and trusts him for the manner in which it is done; and consequently he is held answerable for the wrong of the person so entrusted either in the manner of doing such an act, or in doing such an act under circumstances in which it ought not to have been done; provided that what was done, not from any caprice of the servant, but in the course of the employment."

It is thus clear that even when the wrong of the employee is doing the act in question under circumstances in which it ought not to have been done is also a wrong for which the master is responsible. The bank has to be held answerable for the wrong of the security guard in doing the unlawful act under circumstances in which it ought not to have been done. The submission made by the learned counsel for the bank that the act was done from caprice of the security guard cannot be accepted as the security guard is not shown to have any enmity with the deceased. The aforesaid decision in Warren vs. Henlys Ltd. (Supra), therefore, does not dissuade the Court from passing orders against the bank in so far as the principle of vicarious liability is concerned.

9. Hillen and Pettigrew vs. ICI (Alkali) Ltd., 1936 AC 65 was a case dealing with the duties of the stevedores and the facts in the said case have nothing in

common with the instant case.

Reliance placed by the learned counsel for the bank on the decisions of the Court of Appeal in Abrahams vs. Deakin, 1891 QB 516 also does not carry the bank's case any further as that was a case where it was held that the manager of a public house had not implied authority by reason of his position to arrest a customer visiting the public house on the charge of attempting to pass bad money. The plaintiff and a friend went into the defendant's public house, and the plaintiff's friend tendered in payment for some refreshment which they had, a German gold ten-mark piece by mistake for a half-sovereign, and asked the barman for change. The barman went to fetch the change; but before giving it he observed that the coin was a foreign one, and took it back to the plaintiff's friend, who gave him a half-sovereign instead of it, and the barman thereupon gave him the change. The plaintiff and his friend then left the house. A person, who was acting as manager of the bar in the absence of the defendant, followed them into the street, and gave them into the custody of a policeman on a charge of attempting to pass bad money. In an action for false imprisonment, the Court of Appeal held that the defendant was not liable, because the manager had no implied authority by reason of his position to arrest the plaintiff and that the arrest was made for the purpose of vindicating the law by punishing the plaintiff for a criminal offence which he was supposed to have already committed.

The facts in the instant case are, however, very clear that the incident in question took place when the cash box was being brought into the bank premises and the deceased was also entering the bank premises after parking his scooter. If the security guard committed an error in perceiving the act of the deceased as a threat to the cash box or the wrong parking of the scooter as an impediment of protection of the property of the bank from a possible danger from any third party, the act of the security guard causing death of the deceased was in the course of the employment of the security guard and, therefore, it is not possible to accept the defence pleaded by the bank that it is not vicariously liable.

10. It also appears to the Court that the question of applying the principle laid down by the Hon'ble Supreme Court in Kasturi Lal vs. State of U.P., AIR 1965 SC 1039 would not arise in the instant case as in that case the Apex Court was concerned with the defence of sovereign immunity. Here, the respondent bank - a separate entity

from the Government was carrying on commercial transactions with its customers and was not or is not exercising any sovereign function. Hence, the question of applying the defence of sovereign immunity cannot be invoked.

11. There would, however, be questions about the income of the deceased, the dependency loss suffered by the petitioners and the exact amount of compensation to be quantified and the petitioners will have to lead evidence about the income of the deceased and also the dependency benefit being derived by the petitioners from such income before the exact amount of compensation can be quantified which can be done in a civil suit. The Court cannot, however, be oblivious of the harsh reality that such civil suits are not being decided within any reasonable point of time and that very often even the claim petitions in motor accident cases are decided after a number of years. The Court, therefore, finds the request for some interim compensation a reasonable one.

12. Considering the fact that the deceased was earning more than Rs.2,21,000/- in the financial year 1999-2000, and according to the petitioners, the income of the deceased had gone up in the subsequent financial year, the fact that the deceased was the sole bread winner for the petitioners and considering the age of the deceased who was only 34 years at the time of his death, and also that the civil suit will take some time, the widow and the minor children of the deceased cannot be left in the lurch till the suit is finally decided. Hence, the interests of justice demand that the petitioners be paid interim compensation, subject to certain safeguards. In the peculiar facts and circumstances of the case, the award considers that interim compensation to the extent of 2,50,000/= for each of the three petitioners plus a further amount of Rs.50,000/- by way of costs of proceedings which will have to be instituted by the petitioners will be reasonable. In State of Gujarat vs Dharmista N Rana, 2001 (3) GLR 2056, an interim compensation of Rs. 2,00,000/- was awarded to the widow of the deceased who died in suspicious circumstances. Considering the fact that in the present case there are three petitioners, the widow and two minor children of the deceased, and that the principal amount will remain in fixed deposit with the respondent-bank itself, the interest on Rs.7,50,000/= will be necessary for the bare minimal physical existence of the petitioners till the suit is decided.

13. As far as the question of compassionate

appointment is concerned, nothing is pointed out from the service regulations that there is any scheme for compassionate appointment for persons who are not the heirs of a deceased employee. Even reliance placed by the petitioners on the decision of this Court in State of Gujarat vs. Dharmista N Rana, 2001(3) GLR 2056 does not carry the petitioners' case any further because in that case, the deceased was admittedly an employee of the Government and even if the deceased had died a normal death, the heirs would have been entitled to compassionate appointment. The only controversy in that case was about the nature of the death, whether it was a suicide or a homicide and in the facts and circumstances of that case, the Court found the tale tell circumstances to create a suspicion that it was not a suicide. Hence, over and above the interim compensation of Rs.2 lacs awarded by the learned Single Judge, the Division bench in the Letters Patent Appeal filed by the State Government further directed the Government to give compassionate appointment to the widow of the deceased. Since in the instant case, the deceased was a customer of the bank and not its employee, the principle laid down in the said Division Bench judgment would not apply.

14. As far as the petitioners' claim for compassionate appointment is concerned, the observations made in this judgment are only prima facie and the same shall not preclude the petitioners from pursuing her case before the bank nor does it preclude the bank from getting the matter reconsidered by the Central Government.

15. Before parting with the matter, it is necessary to refer to the recent amendments made to the Code of Civil Procedure, 1908. The object of the said amendments is to ensure that the civil suit is heard and decided as expeditiously as possible and the legislative time table is fixed in such a manner that a suit should ordinarily be decided within one year from the date of institution. While the heavy backlog of old cases may not permit the civil Court to decide all new suits within one year, it appears to the Court that the civil suit which is to be filed by the petitioners would atleast be one case where the civil Court will keep the aforesaid object in mind and hear and decide the suit at the earliest and in any case within one year from the date of institution. At the same time, the civil Court shall take into consideration the fact that petitioner Nos. 2 and 3 are minor children and petitioner No. 1 is a widow residing at Jodhpur in Rajasthan and, therefore, her practical difficulties shall also be taken into consideration while

considering any request on her behalf for adjournment/s.

16. In view of the above discussion, the petition is partly allowed in terms of the following directions and observations :-

I (i) The respondent-bank shall deposit in the petitioners' account with the respondent-bank at its Jodhpur branch a sum of Rs.8,00,000/(Rupees Eight lacs only), by 15.12.2002, out of which petitioner No. 1 shall be permitted to withdraw a sum of Rs.50,000/- for the purpose of instituting a civil suit in a competent Court for claiming compensation from the respondents.

(ii) The balance amount of Rs.7,50,000/- shall remain invested in a fixed deposit account in the name of the petitioners herein with the Jodhpur branch of the respondent-bank for a period of three years and petitioner No. 1 shall be permitted to withdraw monthly/quarterly interest as per the choice of petitioner No. 1 to maintain the family.

(iii) The amount of Rs.7,50,000/- to be deposited by the respondent-bank in a fixed deposit account in the name of the petitioners shall be adjusted against the amount which may ultimately be decreed by the Civil Court as the principal amount of compensation. The additional amount of Rs.50,000/- to be deposited by the respondent bank for expenses of litigation shall be adjusted against the costs which may be awarded by the Civil Court.

II If the petitioners file a civil suit for compensation by 31.12.2002, the trial Court shall hear and decide such suit as expeditiously as possible and in any case by 31.12.2003. The time limit is peremptory and the trial Court shall comply with the provisions of the Civil Procedure Code as amended by the 1999 and 2002 Amendment Acts for expeditious trial and report compliance to this Court keeping in mind the observations made in para 12 of this judgment.

III If at all the respondents reconsider the matter and are inclined to accept the petitioners' request for compassionate appointment, this judgment shall not come in the way of the parties arriving at any settlement as may be acceptable

to the parties.

17. Rule is made absolute to the aforesaid extent with no order as to costs.

(M.S. Shah, J.)

sundar/-